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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2026-2027

SC-2025-0165

OMS Pharmacy, Inc., d/b/a The Pharmacy at Midtown; and
Hannah D. Browne

v.

Nationwide Property and Casualty Insurance Company; Baldo-
Downs Insurance, LLC; and Roger Downs, Inc.

Appeal from Tuscaloosa Circuit Court
(CV-14-901325)

STEWART, Chief Justice.

Hannah D. Browne obtained a \$4.75 million judgment against OMS Pharmacy, Inc. ("OMS"), in the Tuscaloosa Circuit Court ("the trial court") after she was injured by a medication that had been improperly compounded by OMS. This appeal arises from a separate related action to determine whether Browne's claim, and subsequent judgment, is covered under a liability-insurance policy issued to OMS by Nationwide Property and Casualty Insurance Company ("Nationwide") and, if not, whether Roger Downs, Inc., and/or Baldo-Downs Insurance, LLC ("the agency defendants"),¹ were negligent or wanton in failing to procure the proper insurance coverage for OMS. The trial court entered separate summary judgments in favor of Nationwide and the agency defendants. Browne and OMS appeal from those judgments. We affirm.

Facts and Procedural History

The basic underlying facts are undisputed. OMS was founded and incorporated by Tim Wright, an Alabama-licensed pharmacist, and it

¹Roger Downs, Inc., is the agency that obtained the Nationwide policy for OMS, and it was dissolved in 2021. OMS contends that Baldo-Downs Insurance, LLC, is a successor to Roger Downs, Inc.

began its compounding-pharmacy business in 1984.² For 22 years OMS operated as a franchise of The Medicine Shoppe. By the year 2008, OMS had become an independent pharmacy doing business as The Pharmacy at Midtown.

In March 2013, Browne's doctor prescribed her a "pink cocktail" liquid medication for the treatment of stomach pain. As prescribed, the medication was to be composed of equal parts phenobarbital, maalox, and belladonna. In 2013, OMS's supplier had discontinued its commercial generic version of the "pink cocktail," known as Donnatal. Thus, about two weeks before receiving Browne's prescription, OMS had entered the formula for the "pink cocktail" into its computer system so that it would be able to easily compound future prescriptions for the medication. Unfortunately, the OMS pharmacy technician who entered the "pink cocktail" formulation into the computer system made an error and entered the belladonna component of the formula in grams instead of milligrams. That formula was followed when OMS's pharmacy technician compounded the "pink cocktail" prescription for Browne, and,

²It appears that, at all relevant times, Wright was OMS's sole shareholder.

thus, the belladonna contained in the medication provided to Browne was one-thousand times stronger than prescribed. Browne consumed one tablespoon of the improperly compounded "pink cocktail," which caused her to suffer belladonna poisoning. Browne was treated in the intensive-care unit of a hospital, underwent a laparoscopic cholecystectomy, and suffered other serious complications from her consumption of the compound.

In October 2013, Browne sued OMS and Wright in the Tuscaloosa Circuit Court ("the Browne action"). Browne's complaint, as amended, included the following factual allegations:

"7. ... Dr. Philpot ... ordered a 'pink cocktail' mixture of Phenobarbital, Belladonna, and Maalox in an effort to give [Browne] some relief from her symptoms. Dr. Philpot's office called in the compound prescription to a compound pharmacy, [OMS], in Tuscaloosa on or about March 4, 2013. Dr. Philpot's office also noted the dosage to be taken as one-half (1/2) teaspoon every 12 hours.

"8. [OMS] accepted the compound prescription for [Browne] on March 4, 2013 and prepared the prescription and label. [Browne] picked up the prescription on or about March 6, 2013. The label on the prescription stated to take 1 TABLESPOONFUL by mouth as directed 4 TIMES A DAY for 2 WEEKS.

"9. [Browne] took the one (1) tablespoon dosage on March 6, 2013 and within an hour of taking the dosage, she began suffering from nausea, vomiting, hallucinations,

convulsions, bloodshot eyes, confusion, and ultimately became unresponsive. [Browne] was transported ... to DCH Regional Medical Center.

"....

"12. [OMS & Wright] should never have instructed [Browne] to take one (1) tablespoon of the compound produced by Defendant Wright containing Belladonna. [Browne] suffered from Belladonna poisoning after consuming one tablespoon of the pink cocktail. Upon information and belief, Dr. Philpot will testify that the compounded drug Defendant Wright produced, and the instructions provided to [Browne], were not in accordance with what Dr. Philpot prescribed and told the representatives of the pharmacy to give to [Browne].

"13. Upon information and belief, Defendant Wright negligently and/or wantonly formulated, adopted, implemented, supervised, oversaw, and otherwise approved the compound drug given to [Browne] discussed herein in his role as the pharmacist in charge."

Browne asserted against OMS and Wright a negligence/wantonness claim, a products-liability claim, a claim alleging a breach under the Alabama Extended Manufacturer's Liability Doctrine ("AEMLD"); a claim alleging breach of the implied warranty of merchantability; and a claim alleging failure to warn. Browne's complaint included the following negligence/wantonness allegations:

"16. Defendant Wright had a duty under the standard of care of a pharmacist to ensure that any medications and instructions regarding the consumption of said medications were safe and would not cause harm to [Browne] when

consumed. Defendant Wright and/or [OMS and its employees] negligently and/or wantonly breached the standard of care by failing to follow the order of Dr. Craig Philpot in producing the compounded drug and/or in instructing [Browne] of the amount of said drug that she should consume Defendant Wright ... failed to ensure that the compounded drug and the instructions given to [Browne] were safe for [Browne]'s consumption of said drug.

"17. Defendants were negligent and/or wanton in the breach of the standard of care in compounding, design, manufacture, testing, warning, distribution, labeling and/or sale of the prescription that is the subject matter of this lawsuit."

Browne's product-liability claim and AEMLD claim alleged that OMS and Wright had "manufactured, compounded, formulated" a product in a "dangerous and defective condition" and that the product was caused to be defective "because of [their] work in manufacturing the product specially for [Browne]." Browne further alleged that the medication "as manufactured by [OMS and Wright] was not of merchantable quality, was unsafe, and unsuitable for the purposes for which it was intended." Finally, Browne alleged that OMS and Wright had failed to warn her about the dangers inherent in the compounded drug.

OMS's insurer, Nationwide, declined to defend OMS and Wright in the Browne action. The Nationwide policy was a general-liability policy, which did not provide professional-liability coverage, and it contained a

professional-services exclusion, which excluded coverage for bodily injury and property damage arising out of "the rendering of, or failure to render, any professional service, treatment, advice or instruction," including "[s]ervice, treatment, advice or instruction in the practice of pharmacy." Nationwide contended that coverage for Browne's injuries was excluded under the professional-services exclusion. The Nationwide policy was obtained for OMS by Roger Downs, Inc., in 2008, and it replaced an insurance policy issued to OMS by Zurich American Insurance Company ("the Zurich policy"). Unlike the Nationwide policy, the Zurich policy had not excluded coverage for bodily injury caused by professional pharmacological services.

On April 29, 2015, Browne, OMS, and Wright reached a settlement of the Browne action, and, as part of that settlement, a consent judgment in the amount of \$4,750,000 was entered in favor of Browne and against OMS. Browne's claims against Wright were dismissed.

On November 11, 2014, while the Browne action was pending, OMS commenced in the trial court a separate action against Nationwide alleging breach of contract and bad faith ("the insurance action"). Alternatively, it sued the agency defendants alleging negligent and/or

wanton failure to procure insurance. In June 2015, Browne was permitted to intervene in the insurance action for the purpose of asserting a direct action against Nationwide pursuant to § 27-23-2, Ala. Code 1975, and she sought to have Nationwide pay the judgment entered against OMS in the Browne action.

In 2016, the agency defendants filed a motion for a summary judgment, which was denied. In 2018, the parties filed cross-motions for a summary judgment as to the insurance-coverage issues. Those motions were denied in January 2020. Nationwide and the agency defendants renewed their respective summary-judgment motions in 2022. On September 21, 2022, the trial court entered a summary judgment in favor of Nationwide, concluding that Browne's claims against OMS fell within the scope of the Nationwide policy's professional-services exclusion and that, therefore, the Nationwide policy did not provide coverage to OMS for Browne's claims. On August 10, 2023, the agency defendants again renewed their motion for a summary judgment.³ On February 6, 2025,

³In response to the agency defendants' renewed motion for a summary judgment, OMS's counsel submitted an affidavit pursuant to Rule 56(f), Ala. R. Civ. P., seeking additional time to complete discovery and noting that Roger Downs had not yet been deposed. On appeal, OMS

the trial court entered a summary judgment in favor of the agency defendants, concluding that, because OMS had received the Nationwide policy that, the trial court concluded, unambiguously excluded coverage for professional services, OMS's claims alleging negligent and/or wanton failure to procure such coverage was precluded by Alabama law. This appeal followed.

Standard of Review

""This Court's review of a summary judgment is de novo. Williams v. State Farm Mut. Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial court applied. Specifically, we must determine whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 952-53 (Ala. 2004). In making such a determination, we must review the evidence in the light most favorable to the nonmovant. Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986). Once the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts

does not challenge the trial court's failure to grant it additional time for discovery.

to the nonmovant to produce 'substantial evidence' as to the existence of a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin Cnty., 538 So. 2d 794, 797-98 (Ala. 1989); Ala. Code 1975, § 12-21-12."

"Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004).'

"Tender Care Veterinary Hosp. Inc. v. First Tuskegee Bank, 168 So. 3d 33, 37 (Ala. 2014). 'When a trial court interprets an insurance policy as a matter of law, that interpretation is subject to a de novo review.' Hartford Cas. Ins. Co. v. Merchants & Farmers Bank, 928 So. 2d 1006, 1009 (Ala. 2005)."

St. Paul Fire & Marine Ins. Co. v. Britt, 203 So. 3d 804, 809 (Ala. 2016).

Analysis

Coverage Under the Nationwide Policy

We first address the summary judgment as to the claims seeking coverage under the Nationwide policy. The Nationwide policy at issue is a standard-form "premier businessowners" liability policy that includes coverage for bodily injury caused by an "occurrence." The basic insuring agreement contained in the Nationwide policy provided, in pertinent part:

"I. COVERAGES

"A. COVERAGE A -- BODILY INJURY AND PROPERTY
DAMAGE LIABILITY

"1. INSURING AGREEMENT

"a. We will pay those sums up to the applicable Limit of Insurance that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages for which there is coverage under this policy. HOWEVER, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply.

"....

"b. This insurance applies to 'bodily injury' and 'property damage' only if:

"(1) The 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory'; and

"(2) The 'bodily injury' or 'property damage' occurs during the policy period"

(Capitalization in original.) An "occurrence" is defined in the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

The trial court concluded that Browne's claims fell within the Nationwide policy's basic insuring agreement. Nevertheless, it concluded

that those claims were excluded from coverage by the professional-services exclusion contained in the Nationwide policy. That exclusion provides, in pertinent part:

"2. EXCLUSIONS

"This insurance, including any duty we have to defend 'suits', does not apply to:

"....

"v. Professional Services

"'Bodily injury' or 'property damage' that arises out of or is a result of the rendering of, or failure to render, any professional service, treatment, advice or instruction. This exclusion includes, but is not limited to, any:

"....

"(9) Service, treatment, advice or instruction in the practice of pharmacy.

"....

"This exclusion applies even if the claims allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by an insured, if the 'occurrence' which caused the 'bodily injury' or 'property damage' involved the rendering or failure to render of any professional service."

(Capitalization in original.)

On appeal, Browne and OMS challenge the trial court's conclusion that Browne's claims against OMS fell within the professional-services exclusion. In analyzing an insurance policy, we apply the following principles:

"'When analyzing an insurance policy, a court gives words used in the policy their common, everyday meaning and interprets them as a reasonable person in the insured's position would have understood them. Western World Ins. Co. v. City of Tusculumbia, 612 So. 2d 1159 (Ala. 1992); St. Paul Fire & Marine Ins. Co. v. Edge Mem'l Hosp., 584 So. 2d 1316 (Ala. 1991). If, under this standard, they are reasonably certain in their meaning, they are not ambiguous as a matter of law and the rule of construction in favor of the insured does not apply. Bituminous Cas. Corp. v. Harris, 372 So. 2d 342 (Ala. Civ. App. 1979). Only in cases of genuine ambiguity or inconsistency is it proper to resort to rules of construction. Canal Ins. Co. v. Old Republic Ins. Co., 718 So. 2d 8 (Ala. 1998). A policy is not made ambiguous by the fact that the parties interpret the policy differently or disagree as to the meaning of a written provision in a contract. Watkins v. United States Fid. & Guar. Co., 656 So. 2d 337 (Ala. 1994). A court must not rewrite a policy so as to include or exclude coverage that was not intended. Upton v. Mississippi Valley Title Ins. Co., 469 So. 2d 548 (Ala. 1985).'

"B.D.B. v. State Farm Mut. Auto. Ins. Co., 814 So. 2d 877, 879-80 (Ala. Civ. App. 2001). However, if a provision in an insurance policy is found to be genuinely ambiguous, 'policies of insurance should be construed liberally in respect to

persons insured and strictly with respect to the insurer.' Crossett v. St. Louis Fire & Marine Ins. Co., 289 Ala. 598, 603, 269 So. 2d 869, 873 (1972)."

State Farm Mut. Auto. Ins. Co. v. Brown, 26 So. 3d 1167, 1169-70 (Ala. 2009). Furthermore,

"[e]xceptions to coverage must be interpreted as narrowly as possible in order to provide maximum coverage for the insured, and must be construed most strongly against the company that drew the policy and issued it.' Alliance Ins. Co. v. Reynolds, 494 So. 2d 609, 612 (Ala. 1986). Where there is no ambiguity in the terms of an insurance contract, the language must be enforced as written, and courts cannot defeat express provisions in a policy, including exclusions from coverage, by making a new contract for the parties; however, '"when ambiguity exists in the language of an exclusion, the exclusion will be construed so as to limit the exclusion to the narrowest application reasonable under the wording.'" Carpet Installation & Supplies of Glenco v. Alfa Mut. Ins. Co., 628 So. 2d 560, 562 (Ala. 1993) (quoting St. Paul Mercury Ins. Co. v. Chilton-Shelby Mental Health Ctr., 595 So. 2d [1375,] 1377 [(Ala. 1992)]).

Porterfield v. Audubon Indem. Co., 856 So. 2d 789, 806 (Ala. 2002).

The Nationwide policy does not expressly define the term "professional services." The fact that the policy does not define a term, however, does not render it inherently ambiguous. See Safeway Ins. Co. of Alabama, Inc. v. Herrera, 912 So. 2d 1140, 1143 (Ala. 2005). One frequently cited decision has explained the term "professional services" as used in an insurance policy as follows:

"The act or service must be such as exacts the use or application of special learning or attainments of some kind. The term 'professional' in the context used in the policy provision means something more than mere proficiency in the performance of a task and implies intellectual skill as contrasted with that used in an occupation for production or sale of commodities. A 'professional' act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual."

Marx v. Hartford Accident & Indem. Co., 183 Neb. 12, 13-14, 157 N.W.2d 870, 871-72 (1968). Importantly in this case, the Nationwide policy identifies the practice of pharmacy as a profession within the meaning of the term "professional services." The policy expressly provides that the term "professional services" includes "[s]ervice, treatment, advice or instruction in the practice of pharmacy."⁴ Further, the word "service" is generally understood as "the performance of some useful act or series of acts for the benefit of another, usu[ally] for a fee," or as "an intangible commodity in the form of human effort, such as labor, skill, or advice." Black's Law Dictionary 1647 (12th ed. 2024).

⁴Alabama also recognizes the practice of pharmacy as a "profession." See § 34-23-1(20), Ala. Code 1975.

Furthermore, the compounding of medicine is acknowledged as being a traditional component of the practice of pharmacy. See, e.g., Thompson v. Western States Med. Ctr., 535 U.S. 357, 360-61 (2002) ("Drug compounding is a process by which a pharmacist or doctor combines, mixes, or alters ingredients to create a medication tailored to the needs of an individual patient. ... It is a traditional component of the practice of pharmacy, ... and is taught as part of the standard curriculum at most pharmacy schools."). Indeed, compounding practices are regulated as part of Alabama's statutory scheme regulating the profession of pharmacy,⁵ and the compounding of medication in Alabama

⁵Alabama law defines the term "pharmacy" as a place where "prescriptions, drugs, [and] medicines ... are sold, offered for sale, compounded, or dispensed," § 34-23-1(21), Ala. Code 1975 (emphasis added), and it defines "compounding" as "[t]he preparation, mixing, assembling, packaging, and labeling of a drug or device as the result of a licensed practitioner's prescription drug order or initiative based on the practitioner/patient/pharmacist relationship in the course of professional practice." § 34-23-150(3), Ala. Code 1975. Further, under Alabama law, a compounding pharmacist has the responsibility to, among other things:

"(1) Verify all prescriptions.

"(2) Approve or reject all components of the compounded product, drug product containers, closures, and labeling.

may only be performed by, or under the supervision of, a licensed pharmacist. See § 34-23-151, Ala. Code 1975.

In the Browne action, Browne specifically alleged that OMS and Wright had breached the professional standard of care by improperly compounding and labeling her prescription, which, she said, proximately resulted in her injuries. Clearly, such claims relate directly to the practice of the profession of pharmacy. Moreover, her claims specifically arose out of the compounding of medication -- an act recognized as involving professional skill and training in the practice of pharmacy and required by Alabama law to be performed by, or under the supervision of,

"(3) Prepare and review all compounding records to assure that no errors have occurred in the compounding process."

§ 34-23-151(c), Ala. Code 1975. Alabama law also charges the Alabama State Board of Pharmacy to establish written procedures for the compounding of drug products. § 34-23-156, Ala. Code 1975.

"Components shall be accurately weighed, measured, or subdivided, as appropriate. The operations shall be checked and rechecked by the compounding pharmacist at each stage of the process to ensure that each weight and measure is correct as stated in the written compounding procedures."

Id. See also Ala. Admin. Code, (State Bd. of Pharmacy) r. 680-X-2-.14(1) ("The practice of pharmacy shall mean ... the compounding, dispensing, administering and labeling of drugs").

a licensed pharmacist. Furthermore, it is undisputed that the act of compounding the medication was performed in direct response to Browne's request that OMS fill her prescription. Under these circumstances, we recognize that the compounding of medication is a "professional service" and that Browne's bodily injury claims "arise[] out of or [are] a result of the rendering of ... [s]ervice, treatment, advice or instruction in the practice of pharmacy."⁶ See Cincinnati Ins. Co. v. Quorum Mgmt. Corp., 186 F. Supp. 3d 1307 (M.D. Fla. 2016) (excluding coverage under professional-services exclusion based on pharmacy's error in compounding veterinary nutritional supplement that led to death of 21 horses); and Philadelphia Indem. Ins. Co. v. Ronin Staffing LLC, No. 3:20-CV-00374-FDW-DSC, Mar. 3, 2022 (W.D. N.C. 2022) (not reported in Federal Supplement) (excluding coverage under professional-services exclusion based on pharmacy technician's error in compounding

⁶Browne argues that her claims are based on a "keyboarding error" in entering the compounding formula into the computer, which, she posits, is not a "professional" act. We disagree. As set out above, and consistent with the allegations of Browne's complaint, it is within a pharmacist's professional responsibility to confirm that medications are correctly compounded as prescribed.

saline bag; the compounding required professional skill and training and was intended for patient's treatment).

Browne, however, argues that, even if the professional-services exclusion applies to her claims asserting professional negligence, it does not bar coverage for her defective-product claims. Browne notes that such claims are related to her purchase of a product and not the rendition of a service and that the defective-product claims do not require proof of professional negligence. She, therefore, argues that product-liability claims never fall within the scope of a professional-services exclusion. Browne cites several cases for the proposition that the sale of a product does not constitute a "professional service" within the meaning of a professional-services exclusion. See North Carolina Mut. Wholesale Drug Co. v. Federal Ins. Co., 687 F. Supp. 3d 689 (M.D. N.C. 2023) (holding that commercial distribution of opioid pharmaceutical commodities by pharmaceutical wholesaler to pharmacies was not a professional "service" and that the wholesaler's internal compliance reviews were done to meet its own regulatory obligations and were not provided to the customer in exchange for a fee); Hartford Cas. Ins. Co. v. Dental Org. for Conscious Sedation, LLC, Civil Action No. 10-3483, Apr.

1, 2011 (E.D. Pa. 2011) (not reported in Federal Supplement) (holding that the marketing and sale of dentistry sedation products did not fall within a professional-services exclusion); Nationwide Mut. Ins. Co. v. Kavanaugh Supply, LLC, Civil Action No. 2:11-CV-232-KS-MTP, Feb. 26, 2013 (S.D. Miss. 2013) (not reported in Federal Supplement) (holding that, because insured was seller/renter of medical equipment who did not provide home-health services, coverage for claims against insured for failure of ventilator were not barred under a professional-services exclusion); Leverence v. United States Fid. & Guar., 158 Wis. 2d 64, 462 N.W.2d 218 (Ct. App. 1990) (holding that coverage for claims arising out of the defective manufacture of a prefabricated home was not barred by a professional-services exclusion).

Those cases cited by Browne are distinguishable. Those cases involved the sale or distribution of existing commercial commodities. In contrast, the act of compounding the medication for Browne required the use of professional skill and training and was performed solely for the purpose of filling Browne's immediate need for a prescription -- facts underlying all of Browne's claims.

Furthermore, the policy language does not except product-liability claims from the scope of the professional-services exclusion. To the contrary, the professional-services exclusion excludes coverage for all "[b]odily injury' or 'property damage' that arises out of or is a result of the rendering of, or failure to render, any professional service." (Emphasis added.) The "arises out of" language is broad, but unambiguous, and it encompasses all claims for bodily injury arising from the rendering of a professional service, regardless of the claimant's theory of recovery. See, e.g., Taliaferro v. Progressive Specialty Ins. Co., 821 So. 2d 976, 980 (Ala. 2001) (recognizing that the phrase "arising out of," as used in an insurance policy, has been defined to mean "'origination from,' 'having its origin in,' 'growing out,' or 'flowing from'"), and State Farm Fire & Cas. Co. v. Erwin, 393 So. 2d 996, 998 (Ala. 1981) (recognizing that "[t]he phrase 'arising out of' has been broadly construed" and is ordinarily understood to mean "'originating from,' 'having its origin in,' 'growing out of' or 'flowing from'" (citation omitted)). Here, all of Browne's claims -- even her defective-product claims -- have their origin in, grow out of, or flow from OMS's error in compounding her prescription medication. Thus, they fall within the

plain language of the professional-services exclusion. We, therefore, affirm the summary judgment entered in favor of Nationwide.

Failure-to-Procure-Insurance Claims

Having determined that the Nationwide policy does not provide coverage for Browne's claims, we next turn to OMS's claims against the agency defendants alleging negligent and/or wanton failure to procure insurance. With regard to those claims, we note the following additional facts.

OMS had, for many years, been operated as a franchise of The Medicine Shoppe. Wright testified that The Medicine Shoppe's insurance department had recommended and approved the Zurich policy and had represented to him that it provided specialized coverage for pharmacies. Wright testified that, in the years after OMS had become an independent pharmacy, he had become dissatisfied with the way Zurich had handled claims made by OMS. In 2008, Wright asked Roger Downs, an insurance agent with Roger Downs, Inc., and a regular customer of OMS, to replace the Zurich policy with like coverage. It is undisputed that Wright at least provided Downs with a two-page policy-declarations form for the Zurich policy. The evidence is disputed as to whether Wright provided Downs

with a copy of the Zurich policy, but there is no dispute that Wright would have made that policy available for Downs to review had he sought it. Ultimately, Roger Downs, Inc., procured the Nationwide policy for OMS in 2008.

The Zurich and Nationwide policies differed in at least one critical respect that was not evident from a mere review of the policies' declarations pages. Although both policies were commercial general-liability policies containing a professional-services exclusion, the Zurich policy's professional-services exclusion had expressly excepted and did not apply to certain pharmacological services -- "[t]his exclusion does not apply to ... [p]armacological services if ... [y]ou do business as a retail drug store and do not manufacture or compound in bulk pharmaceuticals for sale by others." The Nationwide policy, on the other hand, expressly excluded coverage for bodily injury and property damage arising out of "[s]ervice, treatment, advice or instruction in the practice of pharmacy." Although Wright received a copy of the Nationwide policy in 2008, and at each subsequent renewal period, he admitted that he did not read the policy exclusions until after Browne's 2013 injury. Wright did read portions of the policy "on occasions," and he testified that he believed that

the policy had provided coverage for products made by OMS, like compounded medications. The Nationwide policy was renewed each year between 2008 and the 2013 injury to Browne. Wright never requested any change in coverage during that time.

"[W]hen an insurance agent or broker, with a view to compensation, undertakes to procure insurance for a client, and unjustifiably or negligently fails to do so, he becomes liable for any damage resulting therefrom." Highlands Underwriters Ins. Co. v. Elegante Inns, Inc., 361 So. 2d 1060, 1065 (Ala. 1978). This Court has recognized that a claim alleging the negligent failure of an insurance agent to procure insurance "requires demonstration of the classic elements of a negligence theory, *i.e.*, "(1) duty, (2) breach of duty, (3) proximate cause, and (4) injury."" Alfa Life Ins. Corp. v. Colza, 159 So. 3d 1240, 1248 (Ala. 2014) (quoting Kanellis v. Pacific Indem. Co., 917 So. 2d 149, 153 (Ala. Civ. App. 2005), quoting in turn Albert v. Hsu, 602 So. 2d 895, 897 (Ala. 2002)). Furthermore, as is true regarding any other type of negligence claim, contributory negligence is a complete defense to a negligent-failure-to-procure-insurance claim. Colza, 159 So. 3d at 1248.

"With regard to establishing contributory negligence as a matter of law, this Court has stated:

"The question of contributory negligence is normally one for the jury. However, where the facts are such that all reasonable persons must reach the same conclusion, contributory negligence may be found as a matter of law. Brown [v. Piggly-Wiggly Stores], 454 So. 2d 1370, 1372 (Ala. 1984)]; see also Carroll v. Deaton, Inc., 555 So. 2d 140, 141 (Ala. 1989).

"To establish contributory negligence as a matter of law, a defendant seeking a [judgment as a matter of law] must show that the plaintiff put himself in danger's way and that the plaintiff had a conscious appreciation of the danger at the moment the incident occurred. See H.R.H. Metals, Inc. v. Miller, 833 So. 2d 18 (Ala. 2002); see also Hicks v. Commercial Union Ins. Co., 652 So. 2d 211, 219 (Ala. 1994). The proof required for establishing contributory negligence as a matter of law should be distinguished from an instruction given to a jury when determining whether a plaintiff has been guilty of contributory negligence. A jury determining whether a plaintiff has been guilty of contributory negligence must decide only whether the plaintiff failed to exercise reasonable care. We protect against the inappropriate use of a summary judgment to establish contributory negligence as a matter of law by requiring the defendant on such a motion to establish by undisputed evidence a plaintiff's conscious appreciation of danger. See H.R.H. Metals, *supra*.'

"Hannah v. Gregg, Bland & Berry, Inc., 840 So. 2d 839, 860-61 (Ala. 2002)."

Colza, 159 So. 2d at 1248-49.

OMS argues that it was not contributorily negligent as a matter of law because, it says, even if Wright had read the entire Nationwide policy, it would not have been clear to him that the policy did not provide coverage for product-liability claims. Indeed, Wright recalled that he had seen language in the Nationwide policy relating to "products" and thinking that such language potentially covered losses arising from medications compounded by OMS. Presumably, Wright was referencing policy language related to the "products-completed operations hazard." Generally, provisions regarding the products-completed operations hazard contemplate liability coverage for bodily injury or property damage caused by an insured's products or completed work and occurring away from the insured's premises.⁷ Although OMS concedes that liability coverage for the products-completed operations hazard remained subject to the general bodily injury and property-damage liability exclusions, including the professional-services exclusion, it argues that Wright should not have been expected to understand the import of such language.

⁷The declarations page for the Nationwide policy provided a separate aggregate policy limited regarding the products-completed operations hazard.

In addressing OMS's argument, we note that this case is similar to Hickox v. Stover, 551 So. 2d 259 (Ala. 1989). In Hickox, an insurance agent represented to an insured that he could replace the insured's existing policy insuring oilfield equipment with identical coverage at a lower premium. The replacement policy, however, had a different co-insurance requirement than the insured's original policy, and, when the insured suffered a loss to the oilfield equipment, the replacement insurance covered only one-third of the loss. The insured sued the agent alleging negligent failure to procure insurance. The trial court entered a summary judgment in favor of the agent on the negligent-procurement claim, in part because it concluded that the insured had been contributorily negligent. This Court reversed the summary judgment because, even though the insured's manager had received the policy and a letter from the agent referencing the co-insurance provision, the insured's manager had testified that he had not understood them.

"[The insured] argues on appeal that the question of whether [its manager] and, through [its manger], the [insured] was contributorily negligent for failing to take some action or to investigate further so as to learn that [its new] policies differed from the [replaced] policy in an unfavorable way is a question of fact that precludes summary judgment on the contributory negligence issue. We have held that '[t]he burden of proving contributory negligence and that it

proximately caused the injury is on the defendant, and [that] a determination of the existence of contributory negligence is for the jury when there is a scintilla of evidence to the contrary.' Hatton v. Chem-Haulers, Inc., 393 So. 2d 950, 954 (Ala. 1981) (citing Elba Wood Products, Inc. v. Brackin, 356 So. 2d 119 (Ala. 1978)). We hold that the defendants have failed to carry their burden of proving that, as a matter of law, [the insured's manager] and [the insured] were guilty of contributory negligence. [The insured's manager] presented testimony indicating that he did not understand the letter from [the agent] or the policy endorsements. Moreover, neither the April 4 letter nor the receipt of the policy, as shown above, triggered a conclusion that the plaintiffs' claim for negligence is barred as a matter of law."

551 So. 2d at 265.⁸

In Colza, *supra*, this Court sharply criticized the above holding in Hickox, essentially finding it inconsistent with a plaintiff's "'general duty ... to read the documents received in connection with a particular transaction,'" which was recognized in Foremost Insurance Co. v. Parham, 693 So. 2d 409 (Ala. 1997), and its progeny. 159 So. 3d at 1251 (citation omitted). The Court in Colza explained:

"[T]he Hickox Court effectively held that the defendants had not established contributory negligence as a matter of law because the insured had submitted evidence that its manager did not understand a letter from the selling agent and the terms of the actual insurance policy -- which explained the extent of the insurance coverage actually procured by the

⁸Section 12-21-12, Ala. Code 1975, abolished the "scintilla rule" referenced in Hickox in favor of the substantial-evidence rule.

agent for the insured and revealed that the coverage was not equivalent to the coverage the insured alleges he charged the agent to procure.

"However, when Hickox was overruled by Foremost Insurance Co.[v. Parham], [693 So. 2d 409 (Ala. 1997),] this Court held that, with regard to a fraud claim, a

"trial court can enter a judgment as a matter of law in a fraud case where the undisputed evidence indicates that the party or parties claiming fraud in a particular transaction were fully capable of reading and understanding their documents, but nonetheless made a deliberate decision to ignore written contract terms.'

"693 So. 2d at 421. The Foremost Court also recognized a plaintiff's 'general duty ... to read the documents received in connection with a particular transaction,' along with a duty to inquire and investigate. Id. In Ex parte Caver, 742 So. 2d 168, 172 (Ala. 1999), we subsequently summarized the effect of Foremost by noting that 'Foremost ended the era of "ostrichism"' that had begun with Hickox. We have since applied Foremost in numerous cases to justify a judgment as a matter of law when plaintiffs have ignored clear written terms in documents provided them in association with a transaction. ...

"As evidenced by ... Foremost's ... progeny, we have essentially held that it is almost never reasonable for an individual to ignore the contents of documents given him or her in association with a transaction. Although the Foremost line of cases deals primarily with fraud claims, there is no reason this principle should not apply to other claims as well."

Id. at 1251-52 (footnote omitted). Thus, Colza pronounced the rule authorizing "a judgment as a matter of law in favor of an agent on a

negligent-procurement claim when documents available to the insured clearly indicate that the insurance in fact procured for the insured is not what the insured subsequently claims he or she requested the agent to procure." Id. at 1255.

Having reaffirmed an insured's duty to read the documents, the Court in Colza reversed a judgment entered on a jury verdict in favor of the plaintiffs on a negligent-failure-to-procure-insurance claim when the documents provided to the plaintiffs upon their application for life insurance clearly apprised them that immediate coverage was not guaranteed. The Court reasoned:

"The documents in this case clearly apprised the Colzas that Dante was not guaranteed immediate coverage upon submitting his application for life insurance to [the agent]. By not reading the documents, they took a risk and put themselves in danger's way. We do not think it unreasonable to conclude as a matter of law that, in this day and age, any adult of sound mind capable of executing a contract necessarily has a conscious appreciation of the risk associated with ignoring documents containing essential terms and conditions related to the transaction that is the subject of the contract. Thus, we ... hold that, because the Colzas "'put [themselves] in danger's way'" and had a "'conscious appreciation of the danger'" of suffering a monetary loss,' Kanellis[v. Pacific Indem. Co.], 917 So. 2d [149,] 155[(Ala. Civ. App. 2005)], in the event Dante died before conditions for immediate coverage were met, any negligent-procurement claim is barred by the doctrine of contributory negligence."

Id. at 1252-53 (footnote omitted).

The Court in Colza also adopted the analysis of the Court of Civil Appeals in Kanellis, supra. In Kanellis, the plaintiffs obtained insurance on a valuable sports car. When the car was damaged in an accident, the insurer paid to have the car repaired, but the policy did not cover the loss of value to the car resulting from its having been wrecked and repaired. The plaintiffs sued their insurance agent alleging that it had negligently failed to procure insurance that would have covered the car's diminution in value. The Court of Civil Appeals affirmed a summary judgment entered in favor of the insurance agent on the basis that the plaintiffs had been contributorily negligent as a matter of law. The court explained:

"In this case, the Kanellises were issued a policy of insurance by [the insurer] that provided that [the insurer]'s sole duty, in the event of a collision that caused the Kanellises' Porsche automobile to be 'partially damaged,' was to 'pay the amount required to repair or replace, whichever is less, the damaged part(s) without deduction for depreciation, up to the amount of coverage.' ... There is no language in the ... policy that would tend to indicate that [the insurer] would pay the Kanellises a separate benefit to compensate them for any depreciation in the value of the Porsche that might result from a collision, and a review of the policy would have revealed that no such depreciation coverage was afforded thereunder. Moreover, the Kanellises adduced no evidence that would tend to indicate that they were anything less than

'competent in intelligence and background to understand insurance policy language.' Allstate Ins. Co.[v. Ware], 824 So. 2d [739,] 745 [(Ala. 2002)].

"... [A]s a matter of law, the Kanellises "'put [themselves] in danger's way"' and had a "'conscious appreciation of the danger"' of suffering a monetary loss in the event of a collision involving the Porsche automobile resulting in a diminution of the value of the Porsche. See Hannah v. Gregg, Bland & Berry, Inc., 840 So. 2d 839, 860 (Ala. 2002)."

917 So. 2d at 154-55.

More recently, in Crook v. Allstate Indemnity Co., 314 So. 3d 1188 (Ala. 2020), a property owner, through his insurance agent, obtained property insurance on his lake front home and other structures. Coverage A of the policy covered the home and attached structures, and Coverage B covered structures separated by a "clear space" from the home. Coverage B had significantly lower policy limits. After the property owner's boat dock and deck structures were damaged in a storm, the insurer determined that the policy limit for Coverage B applied. The property owner sued, alleging, among other claims, a breach-of-contract claim against the insurer and a negligent-failure-to-procure-insurance claim against the agent. On appeal from a summary judgment entered in favor of the insurer and the agent, this Court, as a matter of first

impression, held that the boat dock and deck, which were connected to the home by a wooden staircase, were not attached structures under the plain language of the policy. This Court also affirmed the summary judgment as to the negligent-procurement claim. Id. at 1202. Applying the holdings of Colza and Kanellis, the Court concluded that the property owner had been contributorily negligent as a matter of law because he had not read the policy.

"In the present case, it is undisputed that [the property owner] did not read the policy or the numerous policy-renewal notices sent to him from 2006 to 2015 that explicitly set forth the policy limits and explicitly requested that he read them. Had he done so, [the property owner] would have discovered that the policy limit for Coverage B was only \$11,455 and could have, had he desired, requested additional coverage. [The property owner] failed to do so and thus, "'put [himself] in danger's way'" and had a "'conscious appreciation of the danger'" of suffering a monetary loss.' Kanellis, 917 So. 2d at 155. [The property owner] was contributorily negligent as a matter of law."

Id. The Court rejected the property owner's argument that his failure to read the policy was irrelevant because he could not have known whether the boat dock and deck would be covered under Coverage A or Coverage B; despite the issue of first impression as to coverage, the Court held that the plain language of the policy provided that Coverage B applied to those structures. Id.

Applying the holdings of Colza, Kanellis, and Crook to the facts of this case, we conclude that OMS was contributorily negligent as a matter of law. It is undisputed that Wright did not read the coverage-exclusions portion of the Nationwide policy. Had he done so, he and OMS would have discovered that the policy did not provide coverage for bodily injury or property damage that "arises out of or is a result of the rendering of, or failure to render, any professional service," including "[s]ervice, treatment advice or instruction in the practice of pharmacy." (Emphasis added.) Indeed, the professional-services exclusion contains the only direct reference to the practice of pharmacy in the Nationwide policy.⁹ Discovering that the Nationwide policy excluded coverage for bodily injury or property damage arising from "[s]ervice, treatment, advice or instruction in the practice of pharmacy" would have provided Wright and OMS with a clear indication that the Nationwide policy did not provide the same coverage as the Zurich policy, i.e., the coverage OMS had engaged Roger Downs, Inc., to procure. By failing to fully read the policy, Wright placed OMS ""in danger's way" and had a "conscious

⁹An identically worded professional-services exclusion applies to Coverage B of the Nationwide policy relating to liability coverage for personal and advertising injuries.

appreciation of the danger"" of suffering a monetary loss." Kanellis, 917 So. 2d at 155. Accordingly, we affirm the summary judgment entered in favor of the agency defendants regarding OMS's negligent-failure-to-procure claim.

Finally, OMS challenges the summary judgment regarding its wanton-failure-to-procure-insurance claim against the agency defendants. Our Court has defined "wantonness" as "the conscious doing of some act or the omission of some duty while knowing of the existing conditions and being conscious that, from doing or omitting to do an act, injury will likely or probably result." Ex parte Essary, 992 So. 2d 5, 9 (Ala. 2007). Here, OMS argues that the evidence indicating that Downs agreed to replicate the coverage provided to OMS by the Zurich policy without seeking to actually review the Zurich policy constituted sufficient evidence of wanton conduct to warrant submission of that claim to a jury. We note that the undisputed facts also indicate that Downs did review the declarations page for the Zurich policy but that the difference in each policy's professional-services exclusion was not evident from a mere review of the declarations pages. Furthermore, Wright testified that he did not believe that Downs had had any malicious intent in failing to

procure the requested coverage. Based on our review of the record, we agree with the trial court that OMS did not offer substantial evidence demonstrating that Downs or the agency defendants acted or failed to act while being conscious that injury to OMS would likely or probably result. Accordingly, we affirm the summary judgment as to OMS's wanton-procurement claim.

Conclusion

Based on the foregoing, we affirm the trial court's summary judgments in favor of Nationwide and the agency defendants.

AFFIRMED.

Wise, Bryan, Sellers, Mendheim, Cook, and McCool, JJ., concur.

Parker, J., concurs in part and concurs in the result, with opinion.

Shaw, J., recuses himself.

PARKER, Justice (concurring in part and concurring in result).

I concur in the main opinion's result and in most of its reasoning. I write separately to clarify why the circuit court correctly entered summary judgment in favor of the agency defendants on OMS's claim that those defendants "wantonly" failed to procure insurance.

The main opinion appears to correctly state the standard for wantonness. It properly focuses on the state of the defendant's actual knowledge or consciousness -- that is, whether the defendant was truly aware that the plaintiff would likely be injured by the defendant's acting or failing to act in a certain way. See Ex parte Dixon Mills Volunteer Fire Dep't, 181 So. 3d 325, 333 (Ala. 2015); Bishop v. Poore, 475 So. 2d 486, 487 (Ala. 1985). But under this standard, it should not matter whether, as the main opinion puts it, Downs "had any malicious intent in failing to procure the requested coverage." __ So. 3d at __. Indeed, we have specifically held that wantonness does not require proof of intentional conduct. See Mazda Motor Corp. v. Hurst, 261 So. 3d 167, 189 (Ala. 2017) (quoting Wal-Mart Stores, Inc. v. Thompson, 726 So. 2d 651, 654 (Ala. 1998)).

It is more relevant that a reasonable observer could not have perceived any differences in the old (Zurich) policy and the new (Nationwide) policy from a "mere review of the [two policies'] declarations pages." ____ So. 3d at _____. But even that point does not account for the possibility that Downs may have received OMS's old insurance policy for review in determining proper insurance coverage. To be clear, I take no position on whether OMS presented substantial evidence of this fact; its pharmacist, Wright, testified only that he could not remember whether he had given the old policy to Downs or had merely offered it to him. Either way, though, the focus must remain on what Downs actually knew about the likely consequences of his conduct. And on this front, OMS has simply presented no substantial evidence.